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NO. 87-1725

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

**JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,**
Petitioner,

v.

GEORGE CORDOVA,
Respondent.

**On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit**

PETITIONER'S REPLY BRIEF

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Petitioner and hereinafter "the state," by and through the Attorney General of Texas, and files this his Reply Brief.

I. THE OPINION OF THE COURT OF APPEALS BELOW REPRESENTS AN UNWARRANTED EXTENSION OF THIS COURT'S HOLDING IN *BECK V. ALABAMA* AND FAILS TO ACCORD PROPER DEFERENCE TO THE STATE COURTS' FINDINGS, AS REQUIRED BY 28 U.S.C. § 2254(d).

A. *Because no rational fact finder could have failed to conclude that Cordova, by words or other agreement and with the intent to promote or assist in the commission of the robbery, aided his accomplices in their robbery of the deceased, a jury instruction on a lesser included offense of murder was not constitutionally required.*

In his brief in opposition, Cordova asserts that the court of appeals below did not misinterpret Texas' law of parties, *see* Tex. Penal Code § 7.01 *et seq.* (Vernon 1974), pointing to the court below's recitation of the law as set forth in the Texas Court of Criminal Appeals' opinion in *Cordova v. State*, 698 S.W. 2d 107, 111 (Tex.Crim.App. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1942 (1986). *See* Brief in Opposition at 11. Cordova misapprehends the state's argument. The court below correctly recited that portion of the Court of Criminal Appeals' opinion addressing the sufficiency of the evidence in which the law of parties was discussed. The court below then held, however, that the law of parties required Cordova to possess larcenous intent in order to establish a prior agreement with his accomplices to rob the deceased, and thus to establish his culpability as a party. The question of the requisite culpable mental state was not specifically discussed by the Court of Criminal Appeals in *Cordova v. State, supra*. Nonetheless, a reading of the law of parties clearly reveals that the only mental state required to hold a defendant liable as a party is an *intent to promote or assist the commission of the offense.* Tex. Penal Code Ann. § 7.02 (a) (2) (Vernon 1974); *see also Sanders v. State*, 640 S.W.2d 640 (Tex.App.--Houston 1982); *Cross v. State*, 550 S.W.2d 61 (Tex.

Crim.App.1977); *Raven v. State*, 533 S.W.2d 773 (Tex. Crim.App. 1976). The court below's interpretation of state law is thus fundamentally at odds with the plain meaning of the Texas statute as well as state court interpretation of the statute. The court of appeals' failure to accord even a minimum deference to the state's interpretation of its own law mandates reversal.

B. *The trial court's implicit finding, after applying the correct constitutional standard, that there was no evidence upon which a fact finder could rationally convict Cordova only of a lesser offense of murder is entitled to a presumption of correctness, and the failure of the court of appeals to accord such a presumption mandates reversal.*

Cordova further contends that a presumption of correctness under 28 U.S.C. § 2254(d) should not apply to the trial court's implicit factual finding that there was no evidence that would allow a rational juror to convict Cordova of only a lesser offense. *See* Brief in Opposition at 13-14.[1] He bases this contention on the fact that the court of appeals below applied the federal standard set forth in *Keeble v. United States,* 412 U.S. 205 (1973), which it concluded constituted the due

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[1]Cordova's claim that no finding was made, or even could be made, by the trial judge as to whether the evidence was such that a rational fact finder could convict Cordova of the lesser offense of murder and acquit of capital murder simply defies logic. *See* Brief in Opposition at 12-13. Implicit factual findings are constantly made. *See Wainwright v. Witt*, 469 U.S. 412 (1985) (juror bias); *Marshall v. Lonberger*, 459 U.S. 422 (1983) (lack of credibility).

process standard set forth in *Beck v. Alabama*, 447 U.S. 625 (1980), rather than applying the state standard set forth in *Aguilar v. State*, 682 S.W.2d 556 (Tex.Crim. App. 1985), and *Lugo v. State*, 667 S.W.2d 144 (Tex.Crim.App. 1984). Therefore, Cordova reasons, the statutory presumption cannot apply because the state and federal courts were applying different legal standards. This argument simply ignores the fact that the two standards are indistinguishable to any degree sufficient to ignore the command of § 2254(d).[2]

Moreover, in *Hopper v. Evans*, 456 U.S. 605, 611-12 (1982), the Court compared the *Keeble* standard with the Alabama standard governing lesser included instructions, whether "there is any reasonable theory that would support the position," and concluded that, because the state standard does not offend federal constitutional standards, the state standard should be applied in capital cases. Likewise, the Texas standard comports with the due process requirements set forth in *Beck*, and therefore is the applicable standard to determine whether a lesser included instruction should have been given. To the extent that the court of appeals ignored the application of the state standard, *see Cordova*, 838 F.2d at 767 n.3, it was in error and should be reversed. The trial judge's implicit factual determination, applying a state standard that meets due process requirements under *Beck*, which is supported in the record is entitled to a presumption of correctness under 28 U.S.C. §2254(d). The court of

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[2]The court of appeals notes that the state "conceded" at oral argument that the federal standard was proper in the *Beck* situation. *Cordova*, 838 F.2d at 768; Appendix to Petition at A-7. The "concession" was that the state and federal standard were indistinguishable, and that applying the federal standard was tantamount to applying the state standard. The state never abandoned its assertion that the state standard meets the due process requirements set forth in *Beck*.

appeals may not avoid such a statutory presumption by simply substituting a federal standard for a constitutionally valid state standard. The court of appeals' actions in this case compel reversal.

Respectfully submitted,

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